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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1221

JOHN C. BARNETT,
LEE FRED McINTURFF,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX TO PETITION

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	3
REASONS FOR GRANTING WRIT	6
CONCLUSION	11
APPENDIX	12

CITATIONS

Cases:

Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, S. Ct. 1509	7
Beck v. Ohio, 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223	7
Cooper v. California, 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788	10
Draper v. U. S., 35 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329	8
McCray v. Illinois, 18 L. Ed. 2d 62	8
Montoya v. U. S., 402 F.2d 847 (C.A. 5, 1968)	11
Preston v. U. S., 376 U.S. 364, 11 L. Ed. 2d 777, 84 Sup. Ct. 881	10
Spinelli v. U. S., No. 8 October Term Sup. Ct. 1968	9

United States v. Paige,
324 F.2d 31 (C.A. 4, 1963) 11

Statutes:

26 U.S.C. §5205(a)(2) 3
26 U.S.C. §5604(a)(1) 3
28 U.S.C. §1254.1 2

APPENDIX

Opinion, 3/7/69—[U.S.C.A., Sixth Circuit] 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I

John C. Barnett and Lee Fred McInturff pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the above case on March 7, 1969.

II

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit rendered and filed its opinion on March 7, 1969, not yet reported, a copy of which is printed as an appendix to this petition.

III

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 7, 1969. The jurisdiction of this Court is invoked under Title 28, Sec. 1254.1, U.S.C.

IV

QUESTIONS PRESENTED

No. 1: Did a federal officer who received conclusory information that petitioners would make a delivery of non-tax paid whiskey to a designated place at a particular time from an undisclosed informant, who had given information on three prior occasions only one of which had been partially verified and who observed one of petitioners carrying two one gallon clear jugs of unknown content into the designated place, have probable cause to order petitioners arrested by city police officers after petitioners had departed the residence and traveled several blocks inside the city limits?

No. 2: Was the forcible entry by federal officers of the automobile occupied by petitioners incidental to the arrest of petitioners when the search was made while petitioners were in custody of city police officers en route to city hall?

No. 3: Is evidence that petitioner, Lee Fred McInturff, carried two clear one gallon jugs into a residence and evidence that he was riding as a passenger in an automobile driven by petitioner John C. Barnett which said automobile contained one gallon of non-tax paid whiskey in the trunk sufficient to establish guilt of possession and transportation of non-tax paid whiskey beyond a reasonable doubt?

V

This case involves an arrest without an arrest warrant based on conclusory information from an undisclosed informant and the search of an automobile while petitioners were in custody en route to city hall and arises under the IV Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

VI

STATEMENT

Petitioners were convicted for possession and transportation of one gallon of non-tax paid whiskey. Title 26 U.S.C. Section 5205(a)(2) and 5604(a)(1). Petitioner, Barnett, received a five year sentence and one thousand dollar find, and petitioner, McInturff, received a one year sentence (App. 11a, 12a).

The petitioners were arrested by police officers of the City of Johnson City, Tennessee, without an arrest warrant,

on the night of February 23, 1967, on orders of James R. Beeler, a Federal Alcohol Tax Unit Officer. The automobile driven by petitioner, J. C. Barnett, who was accompanied by petitioner, Lee Fred McInturff, was searched by federal officers, without a search warrant, after the petitioners had been taken from the scene by city police and a state officer en route to city hall, and after the federal officers had been refused permission to search the automobile (App. 24a, 25a, 58a).

A motion to suppress evidence was filed, trial by jury was waived, and the Court after hearing testimony on the motion to suppress overruled the motion to suppress and found both petitioners guilty on both counts of the indictment (App. 5a, 6a, 16a).

At the hearing, James R. Beeler, a Federal A.T.U. Officer, testified that he received information from an undisclosed informant at 6:15 p.m. on February 23rd that the petitioners would deliver non-tax paid whiskey to a known bootlegger named Willard Cook on Red Row just outside the city limits of Johnson City at 8:15 p.m., and that they would be driving a 1959 white and blue two door Chevrolet. That Red Row is an area outside the city limits with several bootlegging joints in it and that both petitioners had records and reputations for dealing with moonshine whiskey (App. 18a, 25a, 26a).

Agent Beeler further testified that the informant also told him that the petitioners would be making a regular milk run delivering to four places in the same vicinity but that the informer did not advise him of the order in which the deliveries would be made.

The informer did not disclose any of the underlying circumstances upon which he based his statement that the petitioners would deliver non-tax paid whiskey. Agent

Beeler testified that he did not ask the informer how he knew that the petitioners would be making the delivery (App. 30a, 31a, 36a, 37a).

Agent Beeler testified on direct examination that the informer had furnished information on at least a half a dozen occasions and that it had proven reliable (App. 17a). On cross-examination he admitted that the informer had only furnished information on three occasions prior to the arrest and the preliminary hearing in this case and that on two occasions the information was not verified. That on the third occasion the informer told him that a still would be located in a certain area and that he had discovered the still and the man reported to own the still was in the vicinity but that he was not arrested. Agent Beeler did not remember when he received this information concerning the still (App. 32a, 34a, 36a, 37a).

Agent Beeler, after receiving the information from the informer at 6:15 called the U. S. Commissioner but his line was busy (App. 19a). He and other officers, federal and state, set up a surveillance of Willard Cook's residence and a so-called drink joint next door. Agents Beeler and Rhea testified that they were about 35 yards from Willard Cook's residence and the so-called drink joint. That a car came in about 8:15 and drove part way without lights. That the trunk lid was raised and Agent Rhea testified that he saw the petitioner, McInturff, go into the back door of Cook's residence carrying two one gallon jugs that were clear but he could not tell if they were empty or not. They testified that McInturff came out after about one minute and the automobile departed without lights (App. 21a, 24a, 44a, 45a, 47a).

Captain Tipton of the Johnson City Police Force testified that the Johnson City Police were contacted at approximately

8:00 p.m., and he saw the automobile go into Red Row and that the lights were turned off approximately 30 to 40 feet before it arrived at Cook's residence and that after it departed the lights were off for approximately 200 yards from the residence. That he stopped the car and arrested the petitioners because requested to do so by Agent Beeler and that he did not see the defendants violating any law (App. 56a, 60a).

Agent Beeler arrived at the scene of the arrest within minutes and asked the petitioner Barnett for the keys to the automobile and was refused, the petitioner stating that if he turned over the keys he would be giving his permission to search the car. The petitioners were then taken to city hall and were en route to city hall when the trunk of the automobile was forcibly entered by the federal agents (App. 24a, 25a, 35a).

Upon searching the trunk of the automobile, one gallon of non-tax paid whiskey was discovered and in addition the trunk contained tools, cigarettes, Coca-Cola syrup, candy and other items. The petitioner, J. C. Barnett, was engaged in the vending machine business and this fact was known to Agent Beeler (App. 25a, 35a, 36a).

VII

REASONS FOR GRANTING WRIT

(1) The undisclosed informer did not relate any of the underlying circumstances of how he knew that the petitioners would make a delivery of non-tax paid whiskey to Willard Cook's at the time and place designated. Agent Beeler testified that he did not ask the informer how he knew that the delivery would be made. The agent ordering the arrest without a warrant thus did not know whether or not

the information conveyed to him was within the personal knowledge of the informer.

In *Beck v. Ohio*, 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 this Court said at Page 147 Lawyers' Edition:

"An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. '*Whether or not the requirements or reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.* Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.' Wong Sun v. United States, 371 U.S. 471, 479, 480, 9 L. Ed. 2d 441, 450, 83 S. Ct. 407." (Emphasis supplied).

In *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, S. Ct. 1509, this Court said at Page 729 Lawyers' Edition:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725, 78 A.L.R. 2d 223, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, was 'credible' or his information 'reliable.'"

In *McCray v. Illinois*, 18 L. Ed. 2d 62, this Court said at Page 67:

> "Unlike the situation in Beck v. Ohio, 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223, each of the officers in this case described with specificity 'what the informer actually said, and why the officer thought the information was credible.' 379 U.S. at 97, 13 L. Ed. 2d at 148. The testimony of each of the officers informed the court of the 'underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"

This case is unlike *Draper v. U. S.*, 35 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 in that in Draper all of the informant's information was personally verified except the remaining unverified bit—that Draper would have the heroin with him. The arrest was made and the remaining unverified bit was verified. In this case, no attempt was made to ascertain the contents of the two one gallon jugs delivered at the time and place referred to by the informer. The petitioners were arrested at a different place and time after they had departed the scene of the alleged delivery. No successful prosecution could be possible for an alleged delivery at the time and place referred to by the informer without evidence of the contents of the two one gallon jugs. Therefore, at the time of the arrest the officers knew that petitioners would not be prosecuted unless they discovered non-tax paid whiskey in the automobile. Agent Beeler admitted that he only had a suspicion that the automobile would contain non-tax paid whiskey at the time he ordered the arrest (App. 39a, 42a, 43a).

The informer had given information on three prior occasions and only on one occasion had the information been partially verified (App. 37a). Agent Beeler testified that it was through no fault of the informer that no arrests were made and the information verified but this statement is a mere conclusion of the agent (App. 32a, 36a).

The District Court during the course of the hearing remarked in regard to the failure of the informer to relate any of the underlying circumstances as follows:

> "THE COURT: That is very much uppermost in the Court's mind. I don't believe I would have issued a search warrant on what Mr. Beeler said here" (App. 54a).

Any evil significance attached to the personal observations of the officers would have to relate back to the information supplied by the informer. Considering the information supplied by the informer separately, it cannot be credited because he did not relate any of the underlying circumstances of how he knew the petitioners would make the delivery as related. *Spinelli v. U. S.*, No. 8 October Term Sup. Ct. 1968.

(2) The automobile driven by petitioner, Barnett, who was accompanied by petitioner, McInturff, was forcibly searched by federal officers, after they had been refused the keys, while the petitioners were in custody of the city police en route to city hall (App. 34a). There was no reason why a search warrant could not have been obtained at the time (App. 26a, 37a).

The Court of Appeals sustained the search as being "substantially contemporaneous" with the arrest and incidental to it. Here, we have an arrest, at a different time and place, for carrying two clear jugs into a residence and no evidence whatsoever as to the contents of the jugs

and for an alleged offense which the officers, of necessity, knew could not be successfully prosecuted. The fact that the petitioners were en route to city hall in custody of city police when the search was being conducted instead of to a United States Commissioner indicates that the search of the automobile was exploratory and that if any contraband was found it would be a federal prosecution and if not, the matter would be left to the city police. The United States Attorney conceded at the hearing that Agent Beeler realized that if he didn't find any whiskey that he would have to let the petitioners go and that Agent Beeler knew there would be no prosecution (App. 55a).

Preston v. U. S., 376 U.S. 364, 11 L. Ed. 2d 777, 34 Sup. Ct. 881 held that once an accused is under arrest and in custody, then a search made at another place without a warrant, is simply not incident to the arrest. *Cooper v. California*, 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788, upheld a search of a vehicle without a warrant at a later time and place because the officers were required by state law to seize the vehicle and because it was seized as a result of the crime for which they arrested petitioner. Here the officers knew that the automobile could not be forfeited to the government. If there could be no prosecution of petitioners their automobile could not be forfeited.

It is submitted that a search following an arrest for an alleged offense which the officers knew would not and could not be successfully prosecuted is not incidental to a lawful arrest.

(3) The only legally admissible evidence as to the defendant's guilt is that he was a passenger in an automobile driven by his co-defendant, J. C. Barnett, that one gallon of non-tax paid whiskey was found in the trunk of the car and that shortly before the arrest, federal agents observed

this defendant carry two one gallon jugs into the residence of a known bootlegger. There is no evidence whatsoever of the contents of the two jugs carried by this defendant into the residence and there is no evidence to prove his possession or transportation of the one gallon jug contained in the trunk of the automobile except that he was a passenger in the automobile (App. 13).

Proof of riding as a passenger in an automobile containing contraband is not sufficient evidence to establish possession of the contraband beyond a reasonable doubt. *Montoya v. U. S.*, 402 F.2d 847 (C.A. 5, 1968); *United States v. Paige*, 324 F.2d 31 (C.A. 4, 1963).

VIII

CONCLUSION

For the foregoing reasons, petitioners contend that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

March 28, 1969.

Appendix

Nos. 18588-18589
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 18,588

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN C. BARNETT,
Defendant-Appellant.

No. 18,589

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEE FRED McINTURFF,
Defendant-Appellant.

ON APPEAL from the United States District Court, Eastern District of Tennessee, Northeastern Division.

Decided March 7, 1969.

Before: Celebrezze and Combs, Circuit Judges, and McAllister, Senior Circuit Judge.

Celebrezze, Circuit Judge. This consolidated appeal comes to us from the United States District Court, Eastern District of Tennessee, wherein John C. Barnett and Lee

Fred McInturff, hereinafter Appellants, were tried without a jury and convicted under an indictment charging the possession and transportation of nontax-paid whiskey, 26 U.S.C. § 5205(a)(2) and § 5604(a)(1).

Appellant Barnett was sentenced to serve five years and fined $1,000 for possession. The imposition of a sentence for transportation was suspended, but he was placed on probation for five years to run consecutively to his term of imprisonment.

Appellant McInturff was sentenced to one year imprisonment for possession and since the imposition of sentence was suspended on the charge of transportation, he was placed on probation for a period of two years running consecutively to his imprisonment.

Both Appellants are now challenging the validity of the search and seizure and the subsequent sentencing. Appellant McInturff is also questioning the sufficiency of the evidence to convict him. Appellants' motion to suppress the evidence obtained by the warrantless search of the auto was denied in the District Court.

On February 23, 1967, Agent James R. Beeler of the United States Treasury Department, Alcohol and Tobacco Tax Division, had a prearranged meeting with a known, but undisclosed, informant at 6:15 p.m., in Johnson City, Tennessee. The informant was to have had more information pertaining to a particular situation, but had not been able to obtain it. According to Agent Beeler, the informant then stated, "Well, you can catch J. C. Barnett and Fred Lee McInturff [Appellants] tonight if you want to because they will be making their 'milk run.'"[1] Agent Beeler was

[1] A "milk run" is a delivery of nontax-paid whiskey from the wholesaler to the retailer. It normally consists of from one to two gallons delivered to each retailer.

told that Appellants would be making several deliveries to bootlegging joints this same evening, and that at approximately 8:15 p.m. Appellants would be making a delivery of nontax-paid whiskey to Willard "Big-un" Cook's drink joint located on Red Row. There were to be three other stops in addition to the one on Red Row. Street names and exact locations of the different drink joints were given for all but one of the stops.

The informant stated that Appellants were obtaining their moonshine in Unicoi County in Limestone Cove. He related that Appellant McInturff would usually pick it up, for Appellant Barnett, who, besides being tied up during the days, would not be bothered with the nontax-paid whiskey, except on delivers. Barnett would be driving a 1959 blue and white two-door Chevrolet. Agent Beeler testified that much of the information was already known to him.

Agent Beeler had known this informant for several years. Although not a regularly paid government informant, he did receive money on different occasions. Agent Beeler testified that no arrests had been made as a result of the information, but that it was through no fault of the informant. On two occasions the stakeouts were discovered prior to the deliveries and on the third a still was blown up. In the latter instance the man purported to have been the operator was found, but no arrest was made.

The meeting between Agent Beeler and the informant lasted for approximately fifteen minutes. Beeler then proceeded across the street to the Alcohol Beverage Commission Office where he met with Special Investigator William H. Lindsey and A.B.C. Agents Cecil Ray, Robert Rhea and Curtis Combs. After relating what he had learned from the informant, Agent Beeler attempted to call United States Commissioner Coleman in Johnson City.

After finding the line busy, at approximately 6:45 p.m. the Agents divided into three teams and left for the Red Row area located outside the Johnson City limits.[2] On previous occasions when Agent Beeler had tried to secure a warrant from Commissioner Coleman after office hours, it had taken approximately two hours to get one issued.

Upon arrival at Red Row Agents Rhea and Beeler set up surveillance in an open field approximately thirty-five yards away from the entrance to Willard Cook's drink joint. Agent Ray and Special Investigator Lindsey were located in a car on Fairfax, which intersected Red Row. Two other City Police vehicles, one containing Agent Combs, were stationed on Millard and Queen Streets. All of the officers and agents were in either walkie-talkie or radio contact.

By 7:15 p.m. the surveillance was completely set up. Shortly thereafter two men drove up and proceeded to Cook's residence. Cook came out and walked over to the drink joint. When he returned to the residence the two men left. It was at this time that the Agents noted the light signals.[3]

Nothing more occurred until about 8:15 p.m. when an automobile came driving into Red Row with its lights off. The auto proceeded to Cook's drink joint and then backed up to his residence. When the auto stopped, Appellant McInturff, the passenger, got out of the auto, opened the

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[2] The overall plan included the use of Johnson City police who were contacted later.

[3] According to the agents when you have an operation involving two buildings electric lights on the buildings are used to signify whether the places are open, where the owner is, whether it's clear for a delivery, etc.

trunk and removed two one-gallon glass jugs which he carried into the house. Although the contents, if any, were not known, the jugs appeared transparent and colorless.[4]

While Beeler was alerting his men to close in, Appellant McInturff returned, empty handed, to the car. Immediately, the car started down Red Row with its lights off. Beeler notified the other teams to be on the lookout for the 1959 Chevrolet. Within minutes the city police spotted the car containing Appellants, and Agent Beeler ordered them stopped.

In a few moments Beeler was at the scene of the arrest and asked Appellant Barnett for the keys to the trunk of the car. Barnett replied, "No, Red, I won't give you the keys, that would be giving my permission to search my vehicle, and I am not giving you my permission." As the Appellants were being driven in a police car to the police station, the search of the auto was started. After finding that access to the trunk could not be reached through the rear seat, the trunk lid was forced open with an axe. A one gallon glass jug of nontax-paid whiskey was found therein.[5] It is this evidence which Appellants allege was illegally seized.

There are three questions before this Court: 1) whether there was probable cause to arrest Appellants and then to search the automobile, 2) whether there was substantial evidence to convict Appellant McInturff, and 3) whether the District Court, by imposing cumulative sentences, imposed double punishment for a single offense?

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[4] The record shows that it was the common custom of the moonshine trade in this area to bottle nontax-paid whiskey in gallon jugs.

[5] In addition to the moonshine, the trunk contained tools, cigarettes, Coca-Cola syrup, candy, and various other items associated with Appellant Barnett's vending machine business.

Appendix

It is Appellants' contention that there was not sufficient probable cause to arrest the Appellants and thus the subsequent search of the automobile was invalid. If, in the alternative, the arrest were valid, the warrantless search was not incident to that arrest.

This Court is of the opinion that prior to the making of the arrest there was legal probable cause to make the arrest and also to search the automobile. *Draper v. United States*, 358 U.S. 307 (1958); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Brinegar v. United States*, 338 U.S. 160 (1949); *Freedman v. Commissioner of Internal Revenue*, 301 F.2d 359 (6th Cir. 1962). There can be no doubt that Agent Beeler believed that Appellants were transporting nontax-paid whiskey when he saw them. See *Carroll v. United States*, 267 U.S. 132, 160 (1928). Although the facts and circumstances known to Agent Beeler "... did not constitute proofs of guilt beyond a reasonable doubt, they did represent probable cause for a reasonable man to believe that Appellants had committed [or were committing] a felony." *United States v. Johnson*, ... F.2d ... (6th Cir. 1968); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1928); *Lovell v. Henderson*, 386 F.2d 257 (6th Cir. 1967).

The facts and circumstances in this case, when considered collectively represent a basis for probable cause. The informant gave a very detailed and accurate description not only of the actual "milk run," but also as to where and when the nontax-paid whiskey would be picked up. Although Agent Beeler did not know whether this information was within the personal knowledge of his informant, coupled with corroboration, reliability, and other factors known to Agent Beeler, it could be used in his formulation of probable cause. *Spinelli v. United States*, 37 U.S.L.W.,

4110, 4112 (U.S. January 27, 1969); *Draper v. United States*, 358 U.S. 307, 313 (1959); *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966) cert. denied 386 U.S. 1008 (1967); see *United States v. Roth*, 391 F.2d 507, 511 (7th Cir. 1967). Here we are not confronted with an arrest based solely on an informant's tip. On previous occasions, this informant had given information which had proved to be reliable. *United States v. Freeman*, 382 F.2d 272 (6th Cir. 1967); see *Draper v. United States*, 358 U.S. 307 (1958). Though no arrests were made, Agent Beeler testified that it was due to no fault of the informant. Agent Beeler had known the informant for several years and had no reason to doubt his truthfulness or reliability. *United States v. Thacker*, 382 F.2d 732 (6th Cir. 1967). The corroborating events which happened subsequent to setting up the surveillance on Red Row, coupled with Agent Beeler's prior experience and knowledge, we believe, were sufficient to constitute probable cause.[6] *United States v. Thacker*, 382 F.2d 732 (6th Cir. 1967); see *Draper v. United States*, 358 U.S. 307 (1958) and *United States v. Freeman*, 382 F.2d 272 (6th Cir. 1967). Any specific event or detail which was not corroborated could be assumed true due to the corroboration of the other events. *Draper v. United States*, 358 U.S. 307 (1958). Although some of the events viewed during the stakeout, if considered out of context, might seem innocent, once coupled with the informant's disclosures, they would help to constitute the probable cause. *United States v. Thacker*, 382 F.2d 732 (6th Cir. 1967); *Newcomb v. United States*, 327 F.2d 649 (9th Cir. 1964).

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[6] A partial listing of the corroborating events consisted of the 8:15 p.m. arrival of an unlighted auto driven by Appellants which matched the informant's description as to year, make, and color. A delivery of "jugs" was also made to "Big-un" Cook. Agent Beeler also knew that there was to be a delivery on Millard Street. According to the agents staked out in that

(Continued on following page)

In *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967), the Court stated that

> "... probable cause is the sum total of the layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the 'laminated' whole."

In light of the survey of the circumstances surrounding the arrest, this Court can reach no conclusion but that probable cause existed for the arrest of the Appellants. *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1928); *United States v. Kucinich*, ... F.2d ... (6th Cir. 1968); *United States v. Johnson*, ... F.2d ... (6th Cir. 1968).

Having concluded that the arrest of Appellants was valid, this Court now turns to the question of whether the search of the automobile which produced the one gallon of nontax-paid whiskey was incident to that arrest. *Ker v. California*, 374 U.S. 23 (1962). Although it is well settled that a valid arrest will justify a limited warrantless search, the practical application of this rule has caused courts considerable difficulty. *Ker v. California*, 374 U.S. 23 (1962); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947); *Carroll v. United States*, 267 U.S. 132 (1928); *Agnello v. United States*, 269 U.S. 20 (1925); *United States v. Kucinich*, ... F.2d

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(Continued from preceding page)

area, no such delivery had been made. Therefore, Beeler could reasonably assume the delivery was to be made and the car still contained nontax-paid whiskey. The agents knew that the area was infamous for its "drink joints," that "Big-un" Cook was a known retailer, and that Appellants had past criminal records for bootlegging.

. . . (6th Cir. 1968). In *United States ex rel. Mahoney v. LaVallee*, 396 F.2d 887, 888 (2d Cir. 1968), the Court stated:

> "It has frequently been suggested that a search conducted without a warrant is reasonable under the Fourth Amendment as incidental to a lawful arrest only if it is 'absolutely necessary' that the police conduct the search without delay." See *McDonald v. United States*, 335 U.S. 451 (1948).

However, the courts have allowed searches where it was neither necessary for the arresting officers to protect themselves from the arrestee nor to prevent the destruction of the fruits or instrumentalities of the crime. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947). The reasonableness of a search under the Fourth Amendment must be found then in the facts and circumstances of each case. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950). Appellants contend that at the time of the search there was no compelling reason why the agents could not have secured a search warrant. However, the validity of the search rests not on the obtainability of a warrant, but rather on whether the search was reasonable. *Cooper v. California*, 386 U.S. 58, 62 (1967), reh. denied 386 U.S. 988 (1967); *United States v. Rabinowitz*, 339 U.S. 56 (1950).

We recognize there is a difference in the standards to be applied to the search of a house or a motor vehicle, for in the latter circumstances the law officers are confronted with a mobility factor.[7] *Preston v. United States*, 376

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[7] In **Cooper v. California**, **supra**, the Court stated that "... searches of cars that are movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property."

U.S. 364, 366 (1963); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132, 153 (1924). In the principal case there was no chance of the auto being driven away, for Appellants were en route to the station house at the time of the search. *Preston v. United States*, *supra*. This Court does not believe that the mobility factor is necessary to justify this search which was incident to a lawful arrest. As in *Rabinowitz*, *supra*, we must look to the particular facts and circumstances to determine the reasonableness of the search and seizure. *United States ex rel. Mahoney v. LeVallee*, 396 F.2d 887 (2d Cir. 1968).

Appellants also claim that the search was not contemporaneous with the arrest and therefore could not be justified as being incidental to that arrest. We are not faced with a situation where Appellants had already been booked at the station house or where the search was made at a place other than where the arrest took place. *Cooper v. California*, 386 U.S. 58 (1967), reh. denied 386 U.S. 988 (1967); *Agnello v. United States*, 269 U.S. 20 (1925); *United States v. LaVallee*, 391 F.2d 123 (2d Cir. 1968). Nor are we faced with a search which is completely unrelated to the arrest. *Preston v. United States*, 376 U.S. 364 (1963). See *Cooper v. California*, 386 U.S. 58 (1967), reh. denied 386 U.S. 988 (1967).

Here the automobile had not been moved from the situs of the arrest and the Appellants were just being taken away.[8] In the cases holding a search as not being incident to an arrest, the arresting officers had gone to the station house

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[8] The testimony is conflicting as to whether Appellants had left for the station or were sitting in a police car at the scene during the search. In any event, Appellants departure could not have preceded the search by more than a couple of minutes.

and returned to the scene of the arrest to search,[9] had conducted searches in areas not within the immediate control of appellant,[10] or larger time lapses had occurred between the arrest and search.[11] Although the Appellants had been arrested prior to the making of the search, Appellants had not arrived at the station house and been booked as was the case in *Preston v. United States*, 376 U.S. 364 (1963), and *Nickens v. LaVallee*, 391 F.2d 123 (2d Cir. 1968). *Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1964), cert. denied 381 U.S. 955 (1965), rehearing denied 382 U.S. 873 (1965).

The record as a whole substantiates that the officers conducting the search had reasonable or probable cause to believe that nontax-paid whiskey would be found. *United States v. Freeman*, 382 F.2d 272 (6th Cir. 1967). See *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1967) (dicta). We are of the opinion that the search and seizure were "substantially contemporaneous" with the arrest and incidental to it. *Stoner v. California*, 376 U.S. 483, 486 (1964); *United States ex rel. Mahoney v. LaVallee*, 396 F.2d 887 (2d Cir. 1968); *Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1964), cert. denied 381 U.S. 955 (1965), rehearing denied 382 U.S. 873 (1965). The District Court properly denied Appellants' motion to suppress evidence on the bases: (1) there was probable cause to make the arrest, (2) the search and seizure were incident to a valid arrest, and (3) the search was limited to the auto which was under the immediate and complete control of the Appellants.

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9 **Nickens v. LaVallee**, 391 F.2d 123 (2d Cir. 1968).

10 **Agnello v. United States**, 269 U.S. 20 (1925).

11 **Preston v. United States**, 376 U.S. 364 (1963); **Nickens v. LaVallee**, 391 F.2d 123 (2d Cir. 1968).

Appellant McInturff alleges that there was not substantial evidence presented to convict him on a charge of possession. It is true that the mere presence at the scene when nontax-paid whiskey is located is not enough to support convictions for possession or transportation, *United States v. Readus*, 367 F.2d 689 (6th Cir. 1966); *United States v. Paige*, 324 F.2d 31 (4th Cir. 1963). However, we are not dealing with a situation of ***mere*** presence. The testimonial evidence presented is such that a reasonable inference could be drawn that Appellant McInturff was a party to the crime. See *United States v. Day*, 394 F.2d 335 (6th Cir. 1968); *Prince v. United States*, 217 F.2d 838 (6th Cir. 1954). We are convinced that the evidence was sufficient to permit the trier of fact to find Appellant McInturff guilty beyond a reasonable doubt. *United States v. Luxemberg*, 374 F.2d 241 (6th Cir. 1967).

Lastly, Appellants contend that the District Court in imposing cumulative sentences on the first and second counts of the indictment imposed double punishment for a single offense.

This Court held in *Mathis v. United States*, 200 F.2d 697 (6th Cir. 1952) that the cumulation of sentences to two consecutive terms of five years' imprisonment on convictions of transporting, and possessing, respectively, a single quantity of distilled spirits in containers without affixed internal revenue stamps at same time and place, was invalid as constituting double punishment for single offense, so as to require that sentence for possession be expunged.

The Government in its brief and argument concedes that if the present case is not distinguishable from *Mathis*, *supra*, that the sentences imposed under Count 2 as to both

Appellants should be expunged. We draw no distinction between this case and *Mathis*, *supra*, and hold that the sentences imposed on both Appellants on the Second Count of the indictment should be expunged.

The judgments of conviction are affirmed, however the causes are remanded to the District Court with directions to expunge the sentences of Appellants imposed upon the Second Count of the indictments.